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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TRI-VALLEY CARES, MARYLIA KELLEY,
JANIS KATE TURNER, and JEDIDJAH DE
VRIES,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF ENERGY,
NATIONAL NUCLEAR SECURITY
ADMINISTRATION, LAWRENCE LIVERMORE
NATIONAL LABORATORY,

Defendants.

Case No. 08-cv-1372-BZ

**ADMINISTRATIVE MOTION
TO CONSIDER WHETHER
Case No. 08-cv-1372-BZ and
Case No. 03-cv-3926-SBA
SHOULD BE RELATED**

1
2 **I. INTRODUCTION**

3 This is the second case filed by the Plaintiffs challenging the Department of Energy's
4 compliance with the National Environmental Policy Act (NEPA) in its proposal to operate a
5 Biosafety Level 3 (BSL-3) laboratory at the Lawrence Livermore National Laboratory (LLNL).
6 The prior case, Tri-Valley CARES et al. v. Dep't of Energy, Case No. 03-cv-3926-SBA (N.D.
7 Cal.), was heard on cross-motions for summary judgment by the Honorable Sandra Brown
8 Armstrong. The prior case resulted in a remand to the DOE to address a single deficiency in the
9 NEPA analysis. As a result of the remand, DOE has revised its NEPA analysis and reauthorized
10 operation of the LLNL BSL-3 facility. The instant case challenges that revised analysis.
11 Because this case and the prior case concern substantially the same parties, property and events,
12 Defendants submit that the cases are related within the meaning of Civil Local Rule 3-12 and
13 that reassignment of the instant case to Judge Armstrong would result in substantial saving of
14 judicial effort.

15 **II. FACTUAL BACKGROUND**

16 On December 16, 2002, pursuant to its statutory mission to reduce the global danger from
17 weapons of mass destruction, including biological weapons, the National Nuclear Security
18 Administration (NNSA), an agency within the DOE, authorized the construction of a Biosafety
19 Level 3 (BSL-3) laboratory at LLNL. Pursuant to NEPA, the DOE described the need for the
20 BSL-3 lab and its conclusion that the lab will not have a significant impact on the environment
21 in a comprehensive Environmental Assessment (EA) and Finding of No Significant Impact
22 (FONSI).

23 On August 26, 2003, plaintiffs Tri-Valley CARES, Marylia Kelley and Janis Kate
24 Turner, among others, brought suit in this district alleging that the EA was inadequate in
25 numerous regards. Dkt No. 1, Case No.03-cv-03926-SBA. The case was assigned to the
26 Honorable Sandra Brown Armstrong. On September 10, 2004, Judge Armstrong issued an
27 order granting in its entirety Defendants' motion for summary judgment and denying Plaintiffs'
28 motion for summary judgment. Id. at Dkt. No. 128. Plaintiffs appealed, and on October 16,

2006, the Ninth Circuit issued a memorandum decision affirming in part, and reversing in part, the district court's decision. In particular, the Court of Appeals found that with the exception of the lack of analysis of the possibility of a terrorist attack, the DOE took "a 'hard look' at the identified environmental concerns and that the DOE's decision was fully informed and well-considered." Tri-Valley CARES v. Dep't of Energy, No. 04-17232, slip op. at *4, 2006 WL 2971651 at *3. With regard to the terrorist attack analysis, the Ninth Circuit reversed the District Court's finding on the basis of an appellate court decision, San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n, 449 F.3d 1016 (9th Cir. 2006), which was decided during the pendency of the appeal. Judge Armstrong therefore remanded the case to the DOE to "consider whether the threat of terrorist activity necessitates the preparation of an Environmental Impact Statement." Dkt. No. 150, Case No.03-cv-03926-SBA.

To comply with the Court's remand order, the DOE has prepared a Revised EA and a Finding a No Significant Impact (FONSI). The only significant difference between the EA reviewed by Judge Armstrong and the Ninth Circuit, and the Revised EA is the analysis of the possibility of terrorist attack which was developed in response the Ninth Circuit's direction.

III. STATEMENT OF THE RELATIONSHIP OF THE ACTIONS

A. Both Actions Concern Substantially the Same Parties

There is no dispute that both actions concern substantially the same parties. Plaintiffs in the instant case, Tri-Valley CARES, Marylia Kelley and Janis Kate Turner, were also Plaintiffs in the earlier filed case, 03-cv-3926-SBA. Defendants in the instant case, the United States Department of Energy, the National Nuclear Security Administration and Lawrence Livermore National Laboratory were all Defendants in the earlier filed case. While the instant case includes an individual plaintiff not present in the earlier action, and the earlier action included several plaintiffs not present in this action, these minor differences do not alter that fact that the parties are "substantially" the same.^{1/} See Financial Fusion, Inc. v. Ablaise LTD, No. 06-cv-2451-PVT,

^{1/} As originally filed, 03-cv-3926-SBA, included a New Mexico based organization, Nuclear Watch of New Mexico, several individuals from New Mexico, and included a challenge to a proposed facility at Los Alamos National Laboratory in New Mexico. Claims against the Los

1 2006 WL 3734292, at *3 (N.D. Cal. Dec. 18, 2006) (finding cases related that involved different
2 plaintiffs and the same defendant). Cf. Del Conte v. San Francisco Police Dep't, No. 06-cv-
3 05030-JSW, 2007 WL 1119187, at *4 (N.D. Cal. Apr. 16, 2007)(finding, in context of federal
4 court abstention, that “substantially the same parties” only requires “substantial similarity,” “not
5 exact parallelism”).

6 **B. Both Actions Concern Substantially the Same Property, Transaction or**
7 **Event.**

8 Nor can there be any dispute that both the instant case and the earlier filed case challenge
9 substantially the same property, transaction or event. Both actions challenge DOE’s decision to
10 open a BSL-3 facility at Lawrence Livermore National Laboratory. The physical facility
11 challenged here is precisely the same facility challenged in 03-cv-3926-SBA. The only
12 significant legal difference between the legal documents challenged is the terrorism analysis
13 prepared in compliance with the Ninth Circuit’s remand.

14 **C. Assignment to the Same Judge will Avoid Unduly Burdensome Duplication**
15 **of Labor and Expense.**

16 In the earlier filed action, 03-3926-SBA, Plaintiffs alleged that the Environmental
17 Assessment prepared by the DOE pursuant to NEPA was deficient in numerous regards. To
18 evaluate those claims, Judge Armstrong reviewed the extensive administrative record prepared
19 by the Agency, including a large amount of technical material relating to the safe handling of
20 bio-agents. See Dkt. No. 9-18. On appeal, the Ninth Circuit upheld, with the exception of the
21 lack of analysis concerning the possibility of a terrorist attack, all of Judge Armstrong’s
22 conclusions.

23 To address the single deficiency found by the Court of Appeals, the DOE prepared a
24 revised EA. Thus, with the exception of the documentation underlying the new terrorism
25 analysis and minor updates to reflect new information, the administrative record upon which this
26 case will be heard is the same as that previously reviewed by Judge Armstrong. Defendants

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Alamos facility were mooted by the withdrawal of the authorization for that facility, and were not
pursued by Plaintiffs in the litigation. See Dkt. No. 51, Case No.03-cv-03926-SBA.

1 respectfully submit that it is in the interest of judicial economy to relate the instant case to 03-cv-
2 3926-SBA. Doing so will avoid imposing upon another judicial chambers the burden of
3 reviewing the lengthy administrative record and mastering the relatively technical subject matter
4 to which Judge Armstrong has already devoted considerable time and energy.

5
6 **D. Relation to an Action No Longer Pending is Appropriate.**

7 Defendants anticipate that Plaintiffs will resist relation of this case and their prior
8 challenge on the grounds that their prior challenge to the LLNL BSL-3 facility is no longer
9 pending. Caselaw in this circuit makes clear, however, that cases may be related under Local
10 Rule 3-12 even if one of the cases is not currently pending. See, e.g., Benavides v. Bush, No.
11 08-cv-0102 MHP, 2008 WL 170431, at *2 (N.D. Cal. Jan. 18, 2008) (relating case to action
12 previously dismissed); Besaro Mobile Home Park v. Fremont, No. 05-cv-2886-SBA, 2006
13 WL823386, at *1 (Mar. 28, 2006) (*sua sponte* judicial referral to determine if case is related to
14 action no longer pending) (Armstrong, Judge); Wireless Consumers Alliance, Inc. v. T-Mobile,
15 No. 03-cv-3711-MHP, 2003 WL 22387598, at *5 (N.D. Cal 2003) (noting, in the context of a
16 motion to transfer venue, that cases may be related under Local Rule 3-12 even where the earlier
17 filed case is not longer pending); Grimes v. Sprint, PCS, No. 00-cv-2321-CRB, 2001 WL 30536,
18 at *1 (N.D. Cal. Jan. 2, 2001) (relating case to action previously dismissed).

19 In fact, the Local Rules for the Northern District of California appear to have been
20 amended to *remove* any requirement that the earlier filed case remain pending. In Paul-
21 Lockwood v. Lopez, No. 87-cv-20779-RPA, 1996 WL 162957, at *1 (N.D. Cal. Apr. 3, 1996),
22 the Court denied a motion under Local Rule 3-12 to relate to closed case, because “[t]he relevant
23 Local Rule specifies that a case may only be related to another case that is ‘currently pending in
24 this district.’” (citing Civil L.R. 3-12(a)). The current Local Rules no longer contain the
25 requirement an action be “currently pending.” See Civil L.R. 3-12.

26 Therefore the fact that Plaintiffs prior challenge to the LLNL BSL-3 facility, 03-cv-3926-
27 SBA, is not longer pending does not foreclose its relation, under Local Rule 3-12, to the instant
28 action.

1 **IV. CONCLUSION**

2 Because the instant case concerns substantially the same parties, property and events as
3 Plaintiffs' prior challenge to the LLNL BSL-3 facility, Defendants respectfully submit it is
4 related to Tri-Valley CARES et al. v. Dept. of Energy, Case No. 03-cv-3926-SBA, and that, in
5 order to promote judicial economy, it be reassigned to the Honorable Sandra Brown Armstrong.

6 Dated this 12th day of March, 2008.

7
8 Respectfully submitted,
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10 /s/ Barclay Samford
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